Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	RM-11303
Petition for Rulemaking of Fibertech Networks, LLC	)	
	)	

REPLY COMMENTS OF SUNESYS, INC.

Respectfully submitted,

SUNESYS, INC.

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SUMMARY

It is vitally important that the Commission grant the Fibertech Petition. Both the Commission and Congress have recognized that without timely and reasonably priced access to poles, facilities-based competition can be undermined before it has an opportunity to grow. The record in this proceeding is replete with specific examples and illustrations provided by numerous commenters establishing that utility and/or ILEC practices with regard to pole attachments are undermining facilities-based competition.

Accordingly, the Commission should grant the Fibertech Petition, and initiate a rulemaking to adopt, at the very least, the following core proposals:

1. To "allow use of boxing and extension arms where ...such techniques would render unnecessary a pole replacement or rearrangement of electric facilities," and certain other conditions are met.

2. To adopt a shorter survey period and a specified period for the make-ready work to be completed once the utility has been paid.

3. To allow competitors to hire utility-approved contractors to perform field surveys and make-ready work.

There is no evidence whatsoever that Commission consideration of these limited, core issues in a rulemaking proceeding will result in an unworkable regulatory environment. Moreover, the comments of the parties in support of the Fibertech Petition have demonstrated that numerous competitive providers have the same concerns as Fibertech and Sunesys, and a rulemaking on these core issues will almost certainly bring some much needed clarity to an area where far too little exists. As a result of such new regulations, if they are indeed adopted, competition will prosper from the removal of the impediments of exorbitant costs and delays.

Finally, the complaint process – which adds significant expense and delay itself -- is no solution to the recurring access and competition problems at issue here. Only if the Commission adopts new rules which end the deep-rooted, ongoing abuses cited by Fibertech and the other commenters will competition have an opportunity to develop and grow.

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Sunesys, Inc. ("Sunesys"), by undersigned counsel, hereby submits these Reply Comments in the above-captioned matter.[1] For the reasons set forth herein, and in the initial comments of Sunesys filed on January 30, 2006 (the "Initial Comments"), the Commission should grant Fibertech's Petition.

I. The Public Interest Requires The Commission To Address The Recurring Problems Experienced By Multiple Providers With Respect To Pole Attachments That Are Undermining Competition

It is vitally important that the Commission grant the Fibertech Petition. It was the intent of Congress to develop and promote competition by ensuring that telecommunications providers receive fair and non-discriminatory access to utility poles at reasonable rates.[2] Likewise, the Commission has repeatedly encouraged the development of facilities-based competition. Yet, both the Commission and Congress have recognized that without timely and reasonably priced access to poles, facilities-based competition can be substantially weakened before it has an opportunity to grow.[3]

That, unfortunately, is exactly what is occurring. The record in this proceeding is replete with specific examples and illustrations provided by numerous commenters

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[1] Petition for Rulemaking of Fibertech Networks L.L.C. ("Fibertech Petition"), RM-11303 (2005).
[2] Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd. 6780, 6781 (¶¶2, 5) (1998).
[3] Implementation of Section 703(e) of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, 12 FCC Rcd 11725, 11731 (¶12) (1997).

establishing that utility and/or ILEC practices with regard to pole attachments are undermining facilities-based competition.[4] As a result of the problems discussed in these comments, competitive providers are frequently unable to economically provide services that their customers want and that the providers would otherwise offer. Facilities-based competitors are often left with the Hobson's choice of (1) declining to provide services to customers who want those services, (2) making exorbitant payments to pole owners for attachments – which payments are a windfall to such owners and often fund the owners' upgrades of their system, or (3) prosecuting a continuing series of complaint proceedings that will, themselves, be extremely costly and time consuming.

Moreover, even if a competitive provider agrees to pay, and does in fact pay, what are often exorbitant charges, there are no assurances that the make-ready work will be performed in anywhere near a timely fashion. After a utility or ILEC receives its payment, it may perform the make-ready work promptly, or it may take many, many months – and sometimes several years – to do it. To say the least, such dilatory actions by the owner, while "no skin off its back," often cause competitive providers to suffer significant economic harm, as well as harm to their reputations with their the customers.

To make matters even worse, not only are the delays outrageously excessive in many instances, but efforts to glean estimated completion dates from pole owners are often met with silence. Accordingly, a competitive provider frequently cannot even attempt to manage the expectations of its customer.

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[4] See, e.g., Fibertech Petition; Initial Comments of Sunesys, Inc., p. 5-13; Comments of Comptel, p. 2-5, 9-10; Comments of NextG Networks, Inc., p. 4-12; Comments of Virtual Hipster Corporation, p. 4-8; Comments of Indiana Fiber Works, LLC, p. 1-6; Comments of McLeodUSA Telecommunications Services, Inc., p. 2-8; Comments of segTel, Inc., 2-13; Comments of Tropos Networks, p. 2-3 and Exhibit Thereto (Reply Comments filed in RM 11293); Comments of Sigecom, LLC, p.1-8.

Moreover, while competitive providers are often faced with the last-ditch option of filing and prosecuting an endless series of complaints, such process necessarily involves not only tremendous cost, but also the expenditure of a significant amount of time – time that a competitive provider can ill afford to lose if it wants to keep its customers satisfied. The complaint process does not even begin to resolve the ongoing problems cited by Fibertech in an effective manner.

In short, under the current regulations effective access to poles – and thus competition – continues to be stymied. Accordingly, a rulemaking is needed to further explore and conclusively address these issues to ensure that the public interest goals identified by Congress and the Commission are fulfilled – not undermined. Indeed, even AT&T does not oppose the initiation of a proceeding to consider these matters.[5]

The Commission need not, and in fact should not, decide at this time precisely what new rules to adopt. However, at this juncture, given the substantial record supporting the Fibertech Petition, the Commission should certainly conclude that the public interest warrants a good-faith exploration of these critical issues in the context of a notice and comment rulemaking proceeding. The extent to which facilities-based competition will have an opportunity to develop depends, in large part, upon the Commission's actions in this proceeding.

II. The Commenters Opposing The Fibertech Petition Cannot And Do Not Rebut The Fact That The Initiation Of A Rulemaking Is In The Public Interest

The commenters opposing the Fibertech Petition (the "Opponents") have raised the following three primary objections in opposition to the initiation of a rulemaking proceeding:

[5] Comments of AT&T Inc., p.3.

- Comprehensive rules in this area would be unworkable, would cause a federal/state showdown, or would be an attempt to usurp jurisdiction from NESC or otherwise improperly raise safety, engineering or reliability issues.[6]
- Fibertech raises only isolated instances of purported abuse and there is no indication of any recurring problems.[7]
- If there are matters to be addressed in this area, it can all be done through the complaint process.[8]

As discussed below, these arguments do not merit refusing to implement certain highly necessary, competition-protecting regulations, let alone rejecting a request for a rulemaking to decide whether to implement those rules.

A. The Rulemaking Requested By Fibertech Would Be Reasonably Limited And Well Within The Commission's Authority

The Opponents claim that a fully comprehensive array of regulations that regulates every possible aspect of pole attachments would be unworkable. While such a conclusion may be appropriate where entire regulatory regimes are proposed to be overhauled, none of the commenters supporting the Fibertech Petition supports the adoption of comprehensive regulations that micromanage every conceivable circumstance. In fact, just the opposite is true.

For example, while some comments in support of the Fibertech Petition address certain nuances of the Fibertech proposals in different ways, all of the commenters supporting the Fibertech Petition agree that a rulemaking should be initiated at least with respect to the following three common sense, limited, core proposals raised by Fibertech that will help ensure facilities-based competition is provided an opportunity to grow and

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[6] See, e.g., Comments of United Telecom Council and Edison Electric Institute ("UTC"), p. 3-4; Comments of Ameren Corporation et al. ("Ameren"), p. 6-13; Comments of American Electric Power Service Corporation et al. ("American"), p. 4-13.
[7] See, e.g., Comments of UTC, p. 6; Comments of Amerin, p. 4; Comments of AT&T Inc., p. 3; Comments of American, p. 3-4.
[8] See, e.g., Comments of UTC, p. 5-6.

prosper, and is not stifled by the practices of numerous pole owners. These limited core proposals are as follows:

1. To "allow use of boxing and extension arms where ...such techniques would render unnecessary a pole replacement or rearrangement of electric facilities," and certain other conditions are met.

2. To adopt a shorter survey period and a specified period for the make-ready work to be completed once the utility has been paid.

3. To allow competitors to hire utility-approved contractors to perform field surveys and make-ready work.

There is no evidence whatsoever that Commission consideration of these limited, core issues in a rulemaking proceeding will result in an unworkable regulatory environment. To the contrary, the comments of the parties in support of the Fibertech Petition have demonstrated that a rulemaking on these core issues will almost certainly bring some much needed clarity to an area where far too little exists. As a result of such new regulations, if they are indeed adopted, competition will prosper from the removal of the impediments of exorbitant costs and delays.

Moreover, consideration and/or implementation of the core Fibertech proposals would not cause any type of federal/state showdown. Once these few, limited, core rules are adopted by the Commission, they may or may not be subsequently adopted by those states that govern pole attachments themselves (or used by such states as the basis for their own "best practices" standards). But either way, there is no jurisdictional concern as some Opponents suggest, since such a dual jurisdictional approach is specifically contemplated under Commission rules,[9] and the Commission has already committed that

[9] See 47 C.F.R. § 1.1414(b).

it would assert jurisdiction in a rulemaking context "and propose more specific rules ... if reasonably necessary to facilitate access and the development of competition...."[10]

Further, there is no attempt in this proceeding to usurp jurisdiction from NESC, and the core Fibertech proposals certainly would not do that. For example, NESC does not state that it is permissible to take years to complete make-ready work nor does it govern which contractors can perform the work. Again, the Fibertech Proposal is reasonably limited and should not be rejected due to this unfounded jurisdictional concern.

Finally, Opponents' claims that some of the remedies proposed by Fibertech (such as the use of boxing and extension arms) can cause safety, engineering and reliability issues should be explored in the context of a rulemaking, and is not a reason to forego a rulemaking altogether. As an initial matter, a pole owner's multi-year delay in providing attachments is not a safety, engineering or reliability issue. Rather, it is a harm-to-competition issue. In addition, there are generally no safety, engineering or reliability issues with boxing and extension arms that compel prohibiting their use, as such procedures are commonly employed today. Having said this, if there are safety, engineering or reliability issues with boxing and extension arms that should be addressed in certain circumstances, those issues should be addressed as part of the requested rulemaking, but they should not be used as reasons to forego a rulemaking altogether. See, e.g., 47 C.F.R. § 1.4000 (where the Commission issued rules prohibiting restrictions on the placement of antennas used to receive certain video or fixed wireless services, the

[10] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 16067-68 (¶ 1143) (1996).

rules included an exception relating to legitimate safety issues, i.e., the Commission did not forego instituting rules even though a safety exception was necessary). [11]

B. The Rulemaking Requested By Fibertech Would Address Recurring, Widespread Problems

The Opponents' assertion that the problems identified by Fibertech are "isolated"[12] was clearly premature, and, more importantly, inaccurate. As an initial matter, Comptel, the "leading industry association representing communications service providers and their supply partners," [13] strongly supports grant of the Fibertech Petition. On behalf of its large membership,[14] Comptel has confirmed that the issues identified by Fibertech represent an "additional supply side problem facing" competitive providers.[15]

In addition to the several hundred industry-wide interests that are represented by Comptel, numerous other detailed and helpful comments have been submitted in support of the Fibertech Petition. For example, Sunesys has described in particularity why, without a requirement such as the rule proposed by Fibertech requiring the use of boxing and extension arms in certain situations, Sunesys and other competitive providers have been – and undoubtedly will continue to be – forced to pay for major upgrades or replacements that are unnecessary. As Sunesys indicated in its Comments, utilities often effectively treat Sunesys as a "deep pocket" who they can use to bankroll the resolution

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[11] In addition, any claim by Opponents that the Commission does not have the authority to adopt the Fibertech proposal regarding boxing and extension arms ignores that this proposal applies only where the utility already permits such use, and in any event should be explored in the rulemaking proceeding.
[12] See, e.g., Comments of UTC, p. ii.
[13] See Comments of Comptel, p. 1, n. 1.
[14] See List of Comptel "Member Companies" identified at:
http://www.comptelascent.org/membership/member-companies.htm
[15] See Comments of Comptel, p. 4.

of some of their other concerns, such as replacing or upgrading aging, yet fully compliant, facilities.[16]

With respect to survey and make-ready delays, Sunesys has explained how competitive providers often wait a year or more – and sometimes several years – for their work to be completed after they submit an application,[17] and as a result pole owners should not be permitted to continue to have uncapped and unspecified maximum durations of time in which to complete the make-ready work. Further, Sunesys has demonstrated that Fibertech's request for a shorter survey period is eminently reasonable.

In addition, Sunesys has shown the importance of permitting competitors to hire utility-approved contractors to perform field surveys and make-ready work. Without this requirement, utilities can effectively undermine competition by claiming that they simply do not have the manpower to perform the work in a timely fashion.[18] And regardless of whether those claims are accurate, the fact of the matter is that whenever they are asserted the competitive provider is left with no alternatives unless it can utilize a utility-approved contractor.[19]

Moreover, comments from many other providers strongly support Fibertech's, Comptel's and Sunesys' position on these core issues, as those comments illustrate such other companies are also experiencing the same types of problems identified by

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[16] See Comments of Sunesys, Inc., p. 5.
[17] Id. at 9-12.
[18] Id. at 12-13.
[19] On the issue of contractors, some Opponents claim that using a contractor who is not retained by the pole owner is inappropriate because the pole owner is ultimately responsible if there is a problem with the work performed. However, this point ignores the basic premise of Sunesys' argument on this issue – namely, that only ***utility-approved*** contractors could be used by the competitive provider. If a utility believes the contractor is competent to perform work for the utility there is no reason it should not believe that the contractor is equally competent to perform work for the competitive

Fibertech and Sunesys. As Sigecom LLC stated, "[t]he similarity of Sigecom's experience to that described by Fibertech is an indication that these are not isolated incidents, but rather pervasive obstacles to competition."[20] Likewise, McLeodUSA commented that "McLeod has been struck by the similarity of its own experience to those described by Fibertech."[21] In the same vein, Indiana Fiber Works, LLC stated that its "experiences in regard to survey and make-ready time periods have been similar to Fibertech's" and the company provided examples of the "serious delays" and "unreasonable fees" it has experienced when dealing with utilities, and it also supported the adoption of the Fibertech proposal concerning utility-approved contractors.[22]

Moreover, many other competitive providers have filed comments in this proceeding that, at a minimum, support the adoption of the same three core proposals recommended by Fibertech and supported by Sunesys. A number of these entities described some of the competition-thwarting experiences they have encountered including tremendous delays in the process. For example, segTEL, Inc. discussed how it has submitted applications that have been pending with the utility for over 500 days for as few as 40 pole attachments.[23] NextG Networks, Inc. similarly confirmed that Fibertech is not alone with respect to "difficulties with pole owners on issues of survey and make-ready time periods and use of utility-approved contractors...." and provided specific examples of significant delays experienced with respect to utility performance of make ready work, as well as utilities simply not responding to requests for access.[24]

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provider. This would remove the excuse that the utility did not have the manpower to get the job done in a timely fashion, or that the utility is too busy to perform the work.

[20] Comments of Sigecom LLC, p.1.

[21] Comments of McLeodUSA Telecommunications Services, Inc., p.1.

[22] Comments of Indiana Fiber Works, LLC, p. 2-5.

[23] Comments of segTEL, Inc., p. 5.

[24] Comments of NextG Networks, Inc., p. 5-6.

Further, Virtual Hipster Corporation described in particularity its problems relating to "unreasonable rates, terms and conditions for access, as well as unjust delays in negotiating terms and conditions of access," including being charged exorbitant rates for access.[25] Finally, Tropos Networks confirmed in its comments that the problems identified by Fibertech are only becoming worse as competitive providers are confronted by "the bias if not convenience of utility pole owners to charge monopoly rents and to deny access."[26]

In sum, the Opponents' claims that the record is insufficient to require a rulemaking is directly at odds with the facts. Initiating a rulemaking is certainly warranted in light of the broad-based harm to competitive providers resulting from excessive charges and inordinate delays – frequently in excess of a year – caused in large part by the lack of a specified time period to complete make-ready work. The Commission should not wait until even further business opportunities are lost by competitive providers, or many of those providers go out of business altogether due to practices described in detail in this proceeding, before commencing a rulemaking. By then it may very well be too late. The time to initiate a proceeding is now.

C. The Complaint Process Is Not A Panacea For These Recurring, Deep-Rooted Access And Competition-Related Problems

The recurring problems referenced in the Initial Comments of Sunesys and other competitive providers result in these providers incurring tremendous and unnecessary expense and delay in connection with pole attachments. Yet, when competitive

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[25] Comments of Virtual Hipster Corporation, p. 4-8.
[26] Comments of Tropos Networks, p.2-4 (with respect to the situation becoming worse, Tropos stated that "[u]tility recalcitrance...is becoming even more embedded.")

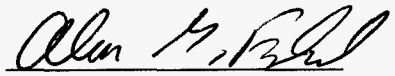
providers are forced to file repeated and multiple complaints against pole owners as a result of these persistent problems, such enormous efforts themselves involve substantial additional expense and delay – which are the two primary problems the providers are struggling with, and are trying to alleviate, in the first place. The Opponents appear all too eager to invite competitive providers to continue to engage in these battles of attrition through the complaint process, but this process – which adds significant expense and delay itself -- is no solution to the recurring, core access and competition problems at issue here. Only if the Commission adopts new rules which end the deep-rooted, ongoing abuses cited by Fibertech and the other commenters will competition have an opportunity to develop and grow.[27]

III. Conclusion

For the foregoing reasons and those set forth in the Fibertech Petition and in Sunesys' Initial Comments, the Commission should grant the Fibertech Petition.

Respectfully submitted,

SUNESYS, INC.



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[27] Although some Opponents claim that the costs of a rulemaking would be better utilized to provide savings for customers, any costs incurred participating in a rulemaking proceeding are far outweighed by the benefit to the public from additional facilities-based competition. Moreover, competitive providers would rather pay the one-time expense involved in participating in a rulemaking proceeding than the repeated costs of participating in one complaint proceeding after another. Utilities should have the same view, but regardless of whether they do, they can certainly afford the costs of a rulemaking proceeding with respect to these competition-determining issues.